85-1256

Supreme Court, U.S.
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NO. 85-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARIAN FLEMING COMSTOCK,
Appellant,

v.

HARRIS COUNTY, TEXAS,
Appellee.

On Appeal From The Court Of Appeals For The Fourteenth Supreme Judicial District Of Texas At Houston

JURISDICTIONAL STATEMENT

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January 20, 1986.

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QUESTION PRESENTED BY APPEAL

Whether the Texas condemnation procedure used by Appellee to condemn Appellant's property violated the Due Process Clauses of the Fifth and Fourteenth Amendments and the Just Compensation Clause of the Fifth Amendment to the federal Constitution by failing to require that Appellee give Appellant and her attorney appropriate notice of the filing of a special commissioners' condemnation award in order to sufficiently secure Appellant's opportunity under Texas law to seek judicial review of the condemnation award.

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HARRIS COUNTY, TEXAS,
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On Appeal From The Court Of Appeals For The Fourteenth Supreme Judicial District Of Texas At Houston

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Texas Court of Appeals for the Fourteenth Supreme Judicial District of Texas at Houston (hereafter "the Houston Court of Appeals"), and the orders of the Supreme Court of Texas refusing Appellant's Application for Writ of Error to the Houston Court of Appeals and denying Appellant's Motion for Rehearing of her Application, which are included in the Appendix, are all unreported.

JURISDICTION

The Houston Court of Appeals' judgment was rendered on February 7, 1985. Appellant timely filed a Motion for Rehearing, that was overruled by the Houston Court of Appeals on March 14, 1985. On April 15, 1985, Appellant timely filed her Application for Writ of Error to the Houston Court of Appeals. On September 18, 1985, the Supreme Court of Texas refused Appellant's Application, and on October 23, 1985, denied Appellant's Motion for Rehearing of her Application. On December 23, 1985, Appellant filed a notice of appeal to this Court in the Houston Court of Appeals. This appeal is being docketed in this Court within 90 days from the denial of rehearing by the Supreme Court of Texas. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN CASE

Fifth Amendment, United States Constitution:

No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Fourteenth Amendment, United States Constitution:

Section 1. . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

Tex. R. Civ. Stat. Ann. art. 3264, Repealed By Acts 1983, 68th Leg., p. 3729, eff. Jan. 1, 1984 (Vernon 1968):

1. When real estate is desired for public use . . . by a county . . . the party desiring to condemn

the property after having failed to agree with the owner of the land on the amount of damages shall file a statement in writing with the county judge of the county in which the land or a part thereof is situated . . .

2. When such statement is filed with the county judge, he shall . . . appoint three disinterested freeholders of said county as special commissioners to assess said damages . . .

* * *

5. Notice in writing shall be issued by the commissioners to each of the parties interested, notifying them of the time and place selected for the hearing.

* * *

10. When service of notice has been perfected, the commissioners shall at the time and place appointed or at any other time and place to which the hearing may be adjourned, proceed to hear the parties.

Tex. Rev. Civ. Stat. Ann. art. 3265, Repealed By Acts 1983, 68th Leg., p. 3729, ch. 576, § 6, eff. Jan. 1, 1984 (Vernon 1968):

* * *

5. When the commissioners have assessed the damages, they shall reduce their decision to writing, stating therein the amount of damages due the owner, if any be found to be due, and shall date and sign such decision and file it together with all other papers connected with the case promptly with the county judge.

Tex. Rev. Civ. Stat. Ann. art. 3266, Repealed By Act 1983, 68th Leg., p. 3729, ch. 576, § 6, eff. Jan. 1, 1984 (Vernon 1968):

* * *

6. If either party be dissatisfied with the decision, such party may, on or before the first Monday following the 20th day after the same has been filed with the county judge, file his objection thereto in writing, setting forth the grounds of his objection, and thereupon the adverse party shall be cited and the cause shall be tried and determined as in other civil causes in the county court . . .

7. If no objections to the decision are filed within the time prescribed by Subdivision 6 of this Article, the County Judge shall cause said decision to be recorded in the minutes of the County Court, and shall make the same the judgment of the court and issue the necessary process to enforce the same.

Tex. Prop. Code Ann. § 21.049. (Vernon 1984):

The judge of a court hearing a proceeding under this chapter shall inform the clerk of the court as to a decision by the special commissioners on the day the decision is filed or on the next working day after the day the decision is filed. Not later than the next working day after the day the decision is filed, the clerk shall send notice of the decision by certified or registered United States mail, return receipt requested, to the parties in the proceeding, or to their attorneys of record, at their addresses of record.

STATEMENT OF THE CASE

On January 25, 1982, Appellee filed a petition in the County Court at Law No. 4 of Harris County, Texas (hereafter "the County Court"), to condemn approximately 8 acres of Appellant's land for use as a public road. Pursuant to the Texas condemnation statutes then in effect, Tex. Rev. Civ. Stat. Ann. arts. 3264, 3265, 3266 (Repealed) (Vernon 1968), the County Court appointed three special commissioners to assess damages. On July 20, 1982, the special commissioners held an evidentiary hearing attended by Appellant and her attorney.

At the conclusion of the hearing, the special commissioners made no award, and Appellee's attorney represented to Appellant's attorney that he would inform Appellant's attorney when the special commissioners made their award and filed it with the County Court. Under Subdivision 6 of Article 3266, Appellant was required to file her objections to the award on or before the first Monday following the 20th day after it was filed with the County Court. Under Subdivision 7 of Article 3266, the timely filing of objections was necessary in order to invoke judicial review of a special commissioners' award. No statutory provision, however, required Appellee to serve Appellant and her attorney with notice of the filing of the special commissioners' award. Furthermore, there was no mandatory time period within which the special commissioners were required to make and file an award.

On July 24, 1982, the special commissioners made their award, assessing $208,531.00 in damages against Appellee. The County Court signed the award and filed it with the Clerk of the County Court on July 26, 1982. Neither Appellant nor her attorney received notice

of these events until September 2, 1982, which was 17 days after the last day for timely filing objections to the award. On September 23, 1982, the County Court, finding that no timely objections to the award had been made, performed the ministerial duty of rendering judgment on the award.

On September 17, 1982, however, Appellant filed a petition for a bill of review in the County Court alleging that she had received no notice of the award until September 2, 1982, and that she had a meritorious defense to the award which she had been prevented from making by Appellee's failure to give her notice of its filing. On October 18, 1983, the County Court granted Appellant's bill of review, finding that Appellee's attorney had represented to Appellant's attorney that Appellant's attorney would be notified of the filing of the special commissioners' award and that the award was filed without any notice being given to Appellant or her attorney until September 2, 1982. The County Court concluded that Appellant's failure to receive notice of the award before September 2, 1982, was not in any way colored by negligence or fault on her part. Appellant's claim for just compensation was then tried before a jury, which awarded Appellant approximately $130,000.00 more in damages than the special commissioners had awarded her. (*See* Appendix *B*).

Appellee's appeal to the Houston Court of Appeals, however, was sustained on Appellee's first point of error that the County Court, as a matter of law, had erred in granting the bill of review because, under Articles 3264, 3265, and 3266, Appellant was not entitled to any notice of the filing of the special commissioners' award

and therefore had the duty to keep herself advised of the progress of the proceedings (See Appendix A).[1] The Houston Court of Appeals therefore set aside the jury's verdict and reinstated the special commissioners' award. (See Appendix C).

Appellant then timely filed a Motion for Rehearing containing the following ground for rehearing:

GROUND NUMBER SEVEN

THE COURT'S HOLDING RESULTS IN A DEPRIVATION OF APPELLEE'S PROPERTY WITHOUT DUE PROCESS OF LAW AND A TAKING OF APPELLEE'S PROPERTY WITHOUT JUST COMPENSATION.

Under this ground for rehearing, Appellant contended that her property had been taken from her in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments and the Just Compensation Clause of the Fifth Amendment to the federal Constitution. Appellant argued that Appellee's failure to give her notice had

1. The Houston Court of Appeals also held that Appellant failed to establish the existence of fraud to the degree necessary to warrant a bill of review under Texas law. However, the Houston Court of Appeals did not sustain any of Appellee's ten points of error asserting no evidence or insufficient evidence to support the County Court's ultimate findings of fact and conclusions of law entitling Appellant to her bill of review, particularly the finding that Appellee failed to give notice of the condemnation award to Appellant and her attorney until after the period for timely filing objections had expired. Hence, the Houston Court of Appeals' conclusion regarding the absence of fraud is not an adequate state law ground precluding this Court's review of the federal question presented, since Appellant's and her attorney's misplaced reliance on the attorney for Appellee's representation that notice would be given them would not have occurred if a statutory provision requiring Appellee to give notice of the filing of the award had existed.

deprived her of a reasonable opportunity to file objections contesting the special commissioners' award. (Appellee's Motion for Rehearing, pp. 13-14). On March 14, 1985, the Houston Court of Appeals overruled Appellant's Motion for Rehearing without commenting on the federal due process and just compensation questions. (See Appendix D).

Appellant then filed an Application for Writ of Error in the Supreme Court of Texas containing the following point:

SEVENTH POINT OF ERROR

THE COURT OF APPEALS' HOLDING RESULTS IN A DEPRIVATION OF PETITIONER'S PROPERTY WITHOUT DUE PROCESS OF LAW AND A TAKING OF PETITIONER'S PROPERTY WITHOUT JUST COMPENSATION.

Under this point, Appellant argued that, in view of the prevailing constitutional due process standards, the Texas condemnation procedure, which failed to provide a landowner with notice of the filing of a special commissioners' award, was patently unconstitutional and that the Houston Court of Appeals' denial of equitable relief had resulted in the deprivation of Appellant's property without just compensation and without due process of law in violation of the Fifth and Fourteenth Amendments to the federal Constitution. (Application for Writ of Error, pp. 25-27; Petitioner's Response to Respondent's Contest to the Application for Writ of Error, pp. 6-11).

On September 18, 1985, the Supreme Court of Texas refused Appellant's Application for Writ of Error with the notation "no reversible error", and on October 23,

1985, overruled Appellant's Motion for Rehearing without commenting on the federal due process and just compensation questions. (*See* Appendix E). On December 23, 1985, Appellant filed her notice of appeal to this Court. (See Appendix F).

THE QUESTION IS SUBSTANTIAL

The substantial question raised is whether the Texas condemnation procedure applied in this case violated the Due Process and Just Compensation Clauses by failing to provide Appellant with notice of the filing of the special commissioners' award so that she could timely exercise her statutory right to judicial review and a jury trial on damages.[2] This important question has not been decided by this Court.

In *Bragg v. Weaver,* 251 U.S. 57 (1919), this Court indicated that if a condemnation procedure failed to provide a means of notifying a landowner of the entry of a special commissioners' award, then the Due Process Clause might be violated. The Court was able to avoid the question because the statutory scheme in *Bragg* provided that if the landowner were *not* present when the award was made, then he would be given notice in writing and have 30 days to obtain judicial review. 251 U.S. at 61-62. Likewise, in *North Laramie Land Company v. Hoffman,* 268 U.S. 276 (1925), a landowner asserted that a statutory procedure for opening roads afforded

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2. In *Long Island Water Supply Company v. Brooklyn,* 166 U.S. 685 (1897), this Court held that the Due Process Clause does not require a jury trial on damages and that damages may be assessed instead by commissioners, "*at least where there is provision for a review of their proceedings in the courts.*" (Emphasis added). 166 U.S. at 694-695.

him no means of ascertaining when the county commissioners' decision to open a road across his property was made, thus commencing the time for obtaining judicial review. As in *Bragg*, however, this Court found in *North Laramie* that the statutes in question provided notice to affected landowners by requiring local publication of the county commissioners' decision.

Unlike the procedures in *Bragg* and *North Laramie*, the condemnation procedure used to condemn Appellant's property failed to provide *any* means of notifying her of the filing of the special commissioners' award. Notice of the filing of the condemnation award was necessary because under the procedure applied here, the special commissioners' award is not accorded finality until the landowner has decided whether to invoke his right to judicial review by filing his objections within 20 days after the award is filed with the County Court. Hence, the proceedings to determine just compensation continue if the landowner exercises his right to judicial review. Consequently, the provision for judicial review clearly presupposes that the landowner must have knowledge of the filing of the special commissioners' award. A landowner's opportunity to continue the proceedings by seeking judicial review is thus rendered meaningless without prior notice of the filing of the award.

Appellant submits that some form of notice was required since neither she nor her attorney were present when the award was made; for a fundamental requirement of due process in any proceeding which is to be accorded *finality* is notice, reasonably calculated under all the circumstances, to apprise the affected party of the pendency of the action and of the opportunity to present objecjections. *Mullane v. Central Hanover Bank & Trust Co.*, 339

U.S. 306, 314 (1950); *Walker v. Hutchinson City*, 352 U.S. 112, 115 (1956). Under these circumstances, the condemnation procedure used to condemn Appellant's property is constitutionally defective. It failed to adequately protect Appellant against an erroneous, arbitrary, and confiscatory condemnation of her property by securing her opportunity to seek judicial review.[3] Indeed, as the jury verdict demonstrates, this case furnishes powerful evidence of how the condemnation procedure applied here could result in an unjust, confiscatory taking by causing a landowner to lose the opportunity to invoke the protection of the courts. *See Dickey v. City of Houston*, 494 S.W.2d 648, 650 (Tex. Civ. App.—Houston [14th Dist.] 1973), *writ ref'd n.r.e.*, 501 S.W.2d 293 (Tex. 1973).

Appellant also submits that, in view of the interests at stake, the circumstances here gave Appellee no excuse for failing to give her notice of the filing of the award. Appellee knew the addresses of both her and her attorney. *Cf. Walker v. Hutchinson City*, 352 U.S. at 116; *Schroeder v. City of New York*, 371 U.S. 208, 210 (1962). That the private interests at stake were

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3. In *Matthews v. Eldridge*, 424 U.S. 319 (1976), this Court established the prevailing test for deciding whether a statutory procedure for the taking of property affords appropriate notice and a sufficient opportunity to be heard under the Due Process Clause:

> [I]dentification of the specific dictates of due process generally requires consideration of three factors: First, the property interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

of sufficient magnitude to require the very procedural safeguards absent in this case is further demonstrated by the action of the Texas Legislature in 1983, when the 68th Legislature unanimously voted to amend Article 3265 to require that a landowner or his attorney of record receive notice by certified or registered mail of the filing of a special commissioners' award. *See* Tex. Prop. Code Ann. § 21.049 (Vernon 1984).[4] This amendment made the Texas condemnation procedure consistent with the notice requirements that Texas law already imposed

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4. The legislative history behind the passage of the new statute reveals that the Texas Legislature was responding to court decisions criticizing the absence of a requirement that a landowner be notified of the filing of a condemnation award. In both *Dickey v. City of Houston, supra,* and *O'Bryan v. County of Harris,* 583 S.W.2d 896 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.), the Houston Court of Appeals itself had recognized the potentiality of the precise federal constitutional deprivations that Appellant suffered in this case:

> [T]his court has previously expressed a concern that the absence of a provision requiring notice to the condemnee of the award presents a serious due process question.
>
> [W]here one's rights to property may be substantially affected by his failure to object to an award filed with a court in a condemnation proceeding, and where the statutory period for making objections to the award runs from the time of the filing of the award, and further, where no notice of the filing of the award is required to be given and none is given the one whose property is in issue, the requisites of procedural due process would not appear to be satisfied.
>
> *Dickey v. City of Houston,* 494 S.W.2d 648, 649-50 (Tex. Civ. App.—Houston [14th Dist.] 1973), affirmed, 501 S.W.2d 293 (Tex. Sup. 1973). *This is particularly true in the absence of a mandatory time frame within which the commissioners must make their award.* Despite the language of the Texas Supreme Court; we remain convinced, in light of recent United States Supreme Court holdings in *Fuentes v. Shevin,* 407 U.S. 67, 92 S. Ct. 1983, 32 L.Ed.2d 556 (1972), and the line of cases following, that the statutory scheme of condemnation in Texas provides a fair and realistic opportunity for the condemnee to learn of the award and preserve his right to appeal.

583 S.W.2d at 898.

on both judicial and administrative agencies. *See* Tex. R. Civ. P. 306a(3), 456, 457; Tex. Rev. Civ. Stat. Ann. art. 6252-13a, Sec. 16(b) (Vernon Supp. 1985).

In amending Article 3265, the Texas Legilature obviously intended to prevent precisely the type of loss that occurred in this case by placing the burden on the condemning authorities to see that landowners or their attorneys of record receive written notice of the filing of special commissioners' awards in order to preserve their rights to judicial review. The Texas appellate courts, however, have denied Appellant's rights to due process and just compensation by rigorously applying the old procedure. That the Texas Legislature has now corrected this problem provided the Houston Court of Appeals and the Supreme Court of Texas with no excuse for denying Appellant's bill of review and overturning her jury verdict. Nor should this fact justify this Court in refusing to grant relief to Appellant. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 425 n.1 (1982); *Griffin v. Griffin*, 327 U.S. 220, 225 n.1 (1946).

This Court should therefore note probable jurisdiction of this appeal to decide whether the Due Process and Just Compensation Clauses of the Fifth and Fourteenth Amendments required Appellee to notify Appellant by reasonable means of the filing of the special commissioners' award in order to secure her opportunity to present her objections to the award and thereby invoke her statutory right to judicial review.

CONCLUSION

Appellant submits that it is fundamentally unfair that she should be made the victim of a condemnation procedure that the Legislative Department of the State of Texas has recognized is unconstitutional. Appellant prays that this Court note probable jurisdiction of this appeal, and reverse the judgment of the Houston Court of Appeals.

Respectfully submitted,

REYNOLDS, ALLEN & COOK
Incorporated

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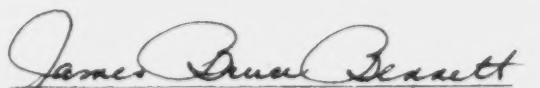
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Jurisdictional Statement has been mailed via certified mail, return receipt requested, to Mr. David H. Melasky, Assistant County Attorney, 1001 Preston, Suite 634, Houston, Texas 77002, this 20th day of January, 1986.


JAMES BRUCE BENNETT

APPENDIX "A"

Reversed and Rendered, and Opinion filed February 7, 1985

No. B14-84-508CV

HARRIS COUNTY, Appellant

v.

MARIAN FLEMING COMSTOCK, Appellee

Appeal from the County Court of Law #4
of Harris County
Trial Court No. 412,886 & 406,942

OPINION

Appellant, Harris County, brings this appeal to challenge an order of the trial court granting appellee's bill of review in a condemnation proceeding. Appellant additionally raises several points of error which concern the subsequent trial. We find the trial court erroneously granted appellee's bill of review; therefore we reverse and render.

On January 19, 1982, appellant initiated condemnation proceedings in the county court against certain property owned by appellee, Marian Fleming Comstock. The court appointed special commissioners who proceeded to conduct a hearing in April of 1982. An award of $186,971.00 was filed with the court. However, due to faulty service, appellee did not receive notice of the hearing and failed to appear. When the county attempted

to take possession of the property, she filed for injunctive relief in district court. A Temporary Restraining Order was issued, followed by an Agreed Injunction, which voided all prior proceedings and ordered the commissioners to conduct a second hearing on July 20 to assess appellee's damages. Ms. Fleming and her attorney were present at the second hearing.

The commissioners filed their second award, pursuant to the July 20 hearing, on July 22, 1982. This award was in the amount of $208,531.00. Appellee failed to file any objections to the award within the period mandated by statute. She instead waited until September 2, 1982, to file her objections. Harris County moved for entry of judgment on the award, which the court granted due to the absence of timely objections. Appellee then filed for a bill of review, which the trial court granted over objection from appellant. The cause was set for trial and at the trial, Harris County renewed its objection to the bill and resulting trial. The jury reached an award of $308,655.00. This appeal followed.

Appellant contends in its first point of error that the trial court improperly granted appellee's bill of review and that the judgment entered on the award should not have been set aside. Two grounds were offered by appellee to support the bill of review. First, she claimed she had not received prompt notification of the filing of the award, and second, appellee alleged that the entry of the judgment was induced by fraud. We must examine each ground to determine if the trial court acted prudently in granting appellee's bill.

The eminent domain statutes which were in effect at the time of the award did not require notice to be served

upon the landowner when the commissioners filed the award. TEX. REV. CIV. STAT. ANN. arts. 3264, 3265 (Vernon 1968) (repealed 1983).[1] Once the property owner received notification of the hearing to assess damages, he assumed the responsibility of keeping himself abreast of all subsequent actions occurring in the condemnation proceeding. *Dickey v. City of Houston,* 501 S.W.2d 293 (Tex. 1973). Accordingly, lack of notice of the filing of an award will not suffice as grounds for a bill of review.

The second ground appellee raised to support her bill of review was that the entry of the judgment was induced by fraud. The party who moves for a bill of review in a condemnation case must establish that fraud, accident or mistake was involved in the rendition of the judgment. *Dickey,* 501 S.W.2d at 294; *O'Bryan v. County of Harris,* 583 S.W.2d 896 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.). The movant must demonstrate that the fraudulent behavior acted to deprive movant from knowing his rights or presenting them at trial. *Alexander v. Hagedorn,* 148 Tex. 565, 226 S.W.2d 996 (1950); *See Swaim v. Texas Electric Service Company,* 590 S.W. 2d 788 (Tex. Civ. App.—Fort Worth 1979, writ ref'd n.r.e.). In *Swaim,* the landowners moved for a bill of review complaining that their failure to file timely objections to the award was due to certain false statements made by an employee of Texas Electric Service Company. They alleged the employee had stated the condemned property would not be fenced, when in fact the award expressly permitted such enclosure of the property. The

1. Eminent Domain statutes are now located at Tex. Prop. Code Ann. ch. 21 (Vernon 1984). The cited provision remains unchanged in the new Code.

court found these representations to be insufficient to support a bill of review. We find that holding to be controlling of the facts presented in this appeal.

A thorough examination of the evidence offered by appellee at the bill of review hearing reveals appellee wholly failed to establish the existence of fraud to the degree necessary to warrant a bill of review. The only evidence appellee offered on the issue of fraud was testimony of her attorney that certain parties had indicated the matter could be expedited. No evidence was offered as to the identity of the speaker or his intent in making the statement. Further, appellee failed to explain how this statement would prevent her from filing a timely objection to the award. *See Swaim*, 590 S.W.2d at 789. To the contrary, such a statement would more reasonably indicate the need to file objections well in advance of the normal deadline, not later.

A review of the record reveals no evidence that would entitle appellee to relief by means of a Bill of Review. We sustain appellant's first point of error and reverse and render that the judgment entered on September 23, 1982, in the amount of $208,531.00 be reinstated. Our disposition of this point eliminates the need to consider appellant's remaining points.

/s/ Bill Cannon
Associate Justice

Judgment Rendered and Opinion filed February 7, 1985.

Panel consist of Associate Justices Pressler, Cannon and Draughn.

APPENDIX "B"

NO. 412,886

IN THE COUNTY CIVIL COURT AT LAW NO. 4
OF HARRIS COUNTY, TEXAS

HARRIS COUNTY, TEXAS

v.

MARIAN FLEMING COMSTOCK, ET AL

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes now Marian W. Fleming, and files these Proposed Findings of Fact and Conclusions of Law and respectfully requests the Court to approve the following:

FINDINGS OF FACT

1. Prior to March 23, 1982, Harris County filed its Original Petition to initiate the condemnation of property owned by Marian W. Fleming which was the subject matter of this cause.

2. The Original Petition was served on Marian W. Fleming on or about March 23, 1982, together with notice of a hearing set to be held before the Special Commissioners on March 30, 1982 for the determination of damages to be awarded to Marian W. Fleming for the condemnation of her property by Harris County.

3. Marian W. Fleming did not receive notice of the March 30 hearing as required by law.

19. Thereafter, the Special Commissioners awarded Marian W. Fleming $208,531.00 as damages resulting from the condemnation of her property by Harris County.

20. The Special Commissioners' award was signed by the Honorable Charles Coussons, Judge of County Civil Court at Law No. 4, on July 24, 1982.

21. The Special Commissioners' award was filed with the County Civil Court at Law No. 4 on July 26, 1982.

22. No notice of the signing or filing of the Special Commissioners' award was given to Marian W. Fleming or her counsel.

23. Neither Marian W. Fleming nor her counsel received notice of the signing or filing of the award of the Special Commissioners until September 2, 1982.

24. Marian W. Fleming filed an objection to the award of the Special Commissioners on September 2, 1982.

25. On September 17, 1982, Marian W. Fleming filed her Bill of Review in the cause styled *Marian W. Fleming v. Harris County, Texas, Cause No. 412,886, County Civil Court at Law #4, Harris County, Texas.*

26. On September 23, 1982, the Honorable Charles Coussons, Judge of the County Civil Court at Law No. 4, signed the judgment on the award of the Special Commissioners.

27. On October 5, 1982, the Bill of Review proceedings were held before the Honorable Charles Coussons, Judge Presiding over County Civil Court at Law No. 4.

28. On October 18, 1983, the Honorable Charles Coussons, Judge of the County Civil Court at Law No. 4, signed the judgment granting the Bill of Review.

29. On May 21, 1984, this cause proceeded to trial.

30. On June 18, 1984, the Honorable Charles Coussons, Judge of the County Civil Court at Law No. 4, signed the judgment in this cause awarding Plaintiff $338,655.00 in damages as the result of the condemnation of her property by Harris County.

CONCLUSIONS OF LAW

1. All jurisdictional prerequisites were met with respect to the Bill of Review.

2. The County Civil Court at Law No. 4 had jurisdiction to consider the Bill of Review and enter a judgment granting the Bill of Review.

3. Marian W. Fleming did not receive notice of the filing of the award of the Special Commissioners prior to September 2, 1982.

4. Marian W. Fleming's failure to receive notice of the award of the Special Commissioners and file an objection thereto prior to September 2, 1982, was the result of fraud, accident or mistake.

5. Marian W. Fleming was not negligent or otherwise at fault in failing to receive notice of the award of the Special Commissioners or file an objection thereto prior to September 2, 1982.

6. The failure of Marian W. Fleming to receive notice of the award of the Special Commissioners and to file an objection thereto prior to September 2, 1982 was not in any way colored by any negligence or any fault.

7. Marian W. Fleming had a meritorious defense to the award of damages by the Special Commissioners and the judgment entered thereon.

Respectfully submitted,

REYNOLDS, ALLEN & COOK
Incorporated

/s/ KYLE R. SEARS
Kyle R. Sears
TBA# 17959800
3300 Allied Bank Plaza
Houston, Texas 77002
(713) 651-1300

Attorneys for Marian W. Fleming

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Proposed Findings of Fact and Conclusions of Law have been mailed to Mr. William Crawford, Assistant County Attorney, 1001 Preston, Suite 634, Houston, Texas 77002 via certified mail, return receipt requested, this 20th day of July, 1984.

/s/ KYLE R. SEARS
Kyle R. Sears

ORDER

Approved as filed. Clerk to notify.

Signed July 26, 1984.

/s/ CHARLES COUSSONS
Judge Presiding

APPENDIX "C"

No. B14-84-508CV

HARRIS COUNTY, Appellant

v.

MARIAN FLEMING COMSTOCK, Appellee

Appeal from the County Court of Law #4
of Harris County
Trial Court No. 412,886 & 406,942

JUDGMENT

"This cause, an appeal from the judgment in favor of Appellee, MARIAN FLEMING COMSTOCK signed October 18, 1983, came on to be heard on the transcript of the record. The same having been inspected, it is the opinion of this Court that the trial court committed reversible error in granting appellee's bill of review. It is ordered and adjudged that the judgment of the Court below be reversed. This court now renders judgment that the judgment entered on September 23, 1982, upon the commissioners award in the amount of $208,531.00 be reinstated.

In addition, it is ordered that Appellee, MARIAN FLEMING COMSTOCK, pay all costs incurred by reason of this appeal. It is further ordered that this decision be certified below for observance."

APPENDIX "D"

COURT OF APPEALS
14th Supreme Judicial District
1307 San Jacinto, 11th Floor
Houston, Texas 77002

March 14, 1985

Hon. William R. Crawford
Assistant County Attorney
1001 Preston
Suite 634
Houston, TX 77002

Hon. David H. Melasky
Assistant County Attorney
1001 Preston, Suite 634
Houston, TX 77002

Hon. Michael K. Swan
Reynolds, Allen & Cook
3300 Allied Bank Plaza
Houston, TX 77002

RE: CASE NO. 14-84-00508-CV
TRIAL COURT CASE NO. 406,942

STYLE: Harris County, Texas
V: Comstock, Marian Fleming, Et Al

Gentlemen:

Please be advised that, on this date, the Court OVERRULED appellee's(s') motion for rehearing in the above cause.

Further, application for writ of error, if any, must be submitted on or before Monday, April 15, 1985.

Respectfully yours,
MARY JANE SMART, Clerk

By: /s/ CHARLENE MITCHELL,
Deputy

RECEIVED: March 18, 1985

APPENDIX "E"

IN THE SUPREME COURT OF TEXAS

No. C-4072 September 18, 1985

MARIAN FLEMING COMSTOCK

v.

HARRIS COUNTY, TEXAS

From Harris County,
Fourteenth District.

Application of petitioner for writ of error to the Court of Appeals for the Fourteenth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Marian Fleming Comstock, pay all costs incurred on this application.

No. C-4072 October 23, 1985

MARIAN FLEMING COMSTOCK

v.

HARRIS COUNTY, TEXAS

From Harris County,
Fourteenth District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, MARY M. WAKEFIELD, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 23rd day of October, 1985.

MARY M. WAKEFIELD, Clerk

By: /s/ COURTLAND CROCKER
Courtland Crocker, Deputy

APPENDIX "F"

IN THE COURT OF APPEALS
FOR THE FOURTEENTH SUPREME JUDICIAL
DISTRICT OF TEXAS AT HOUSTON

NO. 14-84-00508-CV

HARRIS COUNTY, TEXAS,
Appellant,

v.

MARIAN FLEMING COMSTOCK,
Appellee.

(Filed December 23, 1985)

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Marian Fleming Comstock, the Appellee in the above referenced cause, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals for the Fourteenth Supreme Judicial District of Texas at Houston reversing the trial court judgment in Cause No. 406,942 and rendering judgment for Appellant, Harris County, Texas, which was entered in this cause on February 7, 1985. This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ J. BRUCE BENNETT
J. Bruce Bennett
State Bar No. 02145500
Michael K. Swan
State Bar No. 19549000
Reynolds, Allen & Cook
Incorporated
3300 Allied Bank Plaza
Houston, Texas 77002

Counsel for Appellant
Marian Fleming Comstock

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Notice of Appeal to the Supreme Court of the United States, has been served on Mr. William R. Crawford, Assistant County attorney, 1001 Preston, Suite 634, Houston, Texas 77002, by post-paid certified mail, return receipt requested, on the 23rd day of December, 1985.

/s/ J. BRUCE BENNETT
J. Bruce Bennett